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VANSANT KITCHEN & CO. *v.* COMMONWEALTH.

March 12, 1908.

[60 S. E. 753.]

1. Taxation—Assessment—Statutes—Repeal by Implication.—Code 1904, § 437a, provides for the assessment of “all mineral lands, and the improvements, fixtures and machinery thereon,” but makes no provision for the assessment of standing timber separate from the ownership of the soil. Act Feb. 21, 1906 (Acts 1906, p. 38, c. 50), amended the section by adding a provision for the assessment of “all standing merchantable timber trees sold to parties not owning the soil,” etc. By Act March 17, 1906 (Acts 1906, p. 555, c. 319), section 437a was again amended and the section re-enacted, so as to stand as before the first amendment. Held, that the second amendment repealed the first amendment by implication, since, where a later statute is plainly intended to embrace the whole subject and to be wholly substituted for all former statutes, whatever is embraced in it shall prevail and whatever is excluded is repealed; and hence after the passage of the act of March 17, 1906, all authority ceased to tax trees separate and apart from the land upon which they stand.

2. Commerce—Interstate Commerce—Felled Trees Prepared for Exportation—Taxation.—Timber belonging to a citizen of another state, felled in Virginia and placed near water courses to wait for high water to float it to the state of the owner, is not exempt from taxation in Virginia as being in process of exportation as interstate commerce, since it does not become such until the course of transportation has begun.

WINGFIELD *v.* MCGHEE et al.

March 12, 1908.

[60 S. E. 755.]

1. Judgment—Rendition—Time—Vacation.—Consent of parties conferring jurisdiction upon the judge to render judgment or decree in vacation must be given and authenticated as required by Code 1904, § 3427.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 30, Judgment, § 14½.]

2. Same.—A record showing that, “on motion of the plaintiff, it is ordered that the cause be submitted to the judge for decision and decree in vacation,” does not show consent of the parties as required by Code 1904, § 3427, so as to confer jurisdiction upon the judge to render decree in vacation.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 30, Judgment, § 14½.]

3. Same.—The pleadings must be made up and the proof filed be-

fore the court can take time to consider the cause and render judgment in vacation as provided by Code 1904, § 3427, without the consent of the parties.

4. Same.—A decree which is void because rendered in vacation without the consent of the parties, as required by Code 1904, § 3427, is not validated by proceedings in vacation to correct misrecitals therein, as provided by section 3451.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 30, Judgment, § 40.]

STIMMEL, v. BENTHALL, et al.

March 12, 1908.

[60 S. E. 765.]

1. Writ of Error—Decisions Reviewable—Finality.—Plaintiff moved for judgment against defendant and his surety, to which the surety pleaded a set-off of another debt owing by plaintiff to him. After trial the court entered an order that the claim of his surety was just, and that he recover from plaintiff \$300, subject to a credit of \$180 claimed by defendant surety against plaintiff, and for costs. Held, that such order constituted a final disposition of the controversy, subject to review on writ of error.

2. Pleading—Proceedings by Motion—Plea of Set-Off.—Strict rules of pleading do not apply to proceedings by motion and a defense by way of set-off.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 39, Pleading, § 290.]

3. Writ of Error—Objections to Pleadings—Time.—Defendants in error cannot make preliminary objections to pleadings for the first time on a writ of error.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 2, Appeal and Error, §§ 1221-1225.]

4. Set-Off—Claims Subject—Statutes.—Code 1887, § 3298 [Va. Code 1904, p. 1737], provides that in a suit on any debt a set-off shall be allowed if the persons against whom such claim is stand in the relation of principal and surety, and the person entitled to the set-off "is the principal," and section 3299 [page 1740] declares that in any action on a contract the defendant may plead failure of consideration, fraud, breach of warranty, or any other matter which would entitle him to damages at law from the plaintiff or the person under whom plaintiff claimed, or to relief in equity, against the contract, etc. Held, that section 3299 did not alter or modify section 3298, but should be construed in *pari materia* therewith, and therefore there could be no set-off of a purely legal demand owing by plaintiff to a surety alone on the debt plaintiff was seeking to enforce under either section.